IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No. 01-455-A
	)	
ZACARIAS MOUSAOUI	)	

DEFENDANT'S REPLY TO GOVERNMENT'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO STRIKE GOVERNMENT'S NOTICE OF INTENT TO SEEK A SENTENCE OF DEATH

A. The Issue Presented Should Be Decided Now

First, the government urges the Court to delay ruling on the legal sufficiency of its case for death until the Court and the parties have laboriously "death-qualified" a jury, and, assuming a conviction, after a jury has spent weeks hearing evidence in aggravation and mitigation of punishment. *Government's Response in Opposition to Defendant's Motion to Strike Government's Notice of Intent to Seek a Sentence of Death* (hereinafter Gov't. Resp.) at 2, 8-10. Whether the government could unilaterally enforce this call to inaction by refusing to disclose before trial the evidence with which it proposes to establish the threshold factors set forth in 18 U.S.C. § 3591(a)(2), that question is now moot in light of the Government's acknowledgment that its case for death consists of "defendant's participation in the conspiracy [and] his lying to federal agents on August 16-17 to cover up the September 11 plot." In light of this admission, there is no legal or practical impediment to a timely pretrial determination of the sufficiency of the government's case.

B. The Constitutional Requirement of "Major Participation"

In describing the extraordinary breadth of death eligibility under its view of the Constitution, the government states:

> Any one person *willing or preparing* to step on a plane, murder innocent passengers or crew to use the aircraft as a fully fueled bomb, and to do so knowing the planes would be used to destroy buildings with thousands of additional innocent people inside, has to be considered a major participant given the extent of planning such a crime must involve.

(Gov't Resp. at 7 (emphasis added).) The italicized language is in the disjunctive. Thus, the government proposes that a persons *must be* "considered a major participant" in relation to a monumental crime of this sort based solely on his *willingness* to commit the crime, regardless of whether he is even engaged in preparing to do so.

The government's formulation reverses the relationship between "participation" and "intent," as set forth by the Supreme Court in *Tison v. Arizona*, 481 U.S.137 (1987). Indeed, if considered in conjunction with the principles actually set forth in *Tison*, the government's theory becomes entirely circular. In *Tison*, the Supreme Court declared that the minimum constitutional floor for death eligibility could be established by proof that a defendant was a major participant in the underlying felony, if that felony "carr[ies] a grave risk of death . . . ." "Major participation" in such an offense "represents a highly culpable *mental state*" sufficient to satisfy the demands of the Eighth Amendment. *Tison*, 481 U.S. at 158 (emphasis added).

The *Tison* formulation allows for an inference of a culpable mental state from a person's "major participation" in a dangerous felony. The government, however, would have the court do the opposite—infer "major participation" from a culpable mental state, i.e., the "willing[ness]" to commit a

dangerous felony. Thus, at the intersection of the *Tison* and government formulations, *no* actual participation in the homicide or the events directly leading to it—much less major participation—would be necessary; a culpable mental state may be inferred from a defendant's "major participation" in a horrible crime, and that participation could, in turn, be supplied by nothing more than his willingness to participate.[1] While this marvelously circular construct would no doubt help the government establish death eligibility in a great many cases, and, indeed, while it is essential to the government in this case, it violates both *Tison* and common sense.[2]

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[1] That the government's argument proves too much is readily apparent. If, after supposedly agreeing to participate in the conspiracy, Moussaoui had sat on his sofa, watching TV, doing nothing to further the aims of the conspiracy, he would nevertheless be death eligible, since, despite his vegetative state, his "major participation" could be inferred from the planning inherent in the plot which culminated in the deaths of the victims at the hands of his alleged co-conspirators. Such a theory is entirely inconsistent with the constitutional principle of individualized determinations. *See, e.g., Jones v. United States*, 527 U.S. 373, 381 (1999).

[2] In footnote 2 at page 6 of its Response, the government states that 33 of the 38 death penalty states "permit imposition of the death penalty upon someone other than the person who physically commits the murder." The government does not identify those states, not does it state the criteria it has used. For example, Virginia limits death eligibility to the actual triggerman in all cases except in murders-for-hire; it does not allow for death in felony-murder cases, which is all that would be relevant to a discussion of *Enmund* and *Tison*. *See, e.g., Coppola v. Commonwealth,* 220 Va. 243, 257 S.E.2d 797 (1979). The Maryland rule is the same as that of Virginia, as is that of New Jersey, except that drug kingpins may also be death eligible. New York limits the death penalty to triggermen and those who order killings. Louisiana and Connecticut do not have the death penalty for felony murder, and Washington requires great participation in events leading up to the killing to establish eligibility for non-triggermen. It is impossible to tell in which pool the government has included states such as these. Moreover, it does not indicate which states allow the death penalty to be imposed on mere co-conspirators, which is the issue here. Based on an incomplete review of that issue with capital post-conviction lawyers around the country, counsel believes that *at least* the following states do not apply the death penalty to those convicted only of conspiracy: Virginia, Maryland, New York, New Hampshire, New Jersey, Arkansas, Tennessee, Georgia, Florida, Missouri, and Indiana. Many states have not ruled on the issue or resolution of the issue otherwise remains unclear. Due to time limitations, counsel had no information as to eleven death penalty states.

The government's formulation would also allow death eligibility to be predicated on mere *preparation* to commit an offense, which, while perhaps not quite as far off the constitutional and statutory marks as mere *willingness* to commit the offense, "preparation" without more still falls far short of the minimum requirement for death eligibility set forth in *Tison* and *Enmund v. Florida*, 458 U.S. 782 (1982). Again, the person whose relationship to the actual death of the victim is solely his "preparation" to assist in the murder undoubtedly has an improper intent. However, whatever his intent, his *conduct* does not render him a major participant under *Tison*, nor can his acts be said to have directly caused the deaths of the victims within the meaning of § 3591(a)(2)(C). The preparation to commit the offense, in the absence of any nexus to the actual completion of the offense by co-conspirators, adds nothing to the constitutional or statutory equation beyond reinforcement of his improper intent, which is insufficient to establish death eligibility.

None of the cases cited by the government support its theory that death may be imposed based on homicidal intent alone, absent overt acts which actually contribute to the death of the victim. As the government's own description of the facts in *Tison* demonstrates, the defendants in that case participated in every aspect of the underlying dangerous felony, except the actual killing of the victims. *Govt's Resp*. at 5. Similarly, in *Fairchild v. Norris*, 21 F.3d 799, 803-05 (8th Cir. 1994), the defendant actively participated in kidnaping the victim at gunpoint, driving her to a deserted location, and raping her. (*See* Gov't Resp. at 6.) And in *Lesko* v. *Lehman*, 925 F.2d 1527 (3rd Cir. 1991), the facts of which the government does not set forth, the Court noted that, "[l]ike the Tison brothers, and unlike Enmund, Lesko was 'actively involved' and 'physically present during the entire sequence of criminal activity,' culminating in the homicide." *Id*. at 1551 (*quoting* and *citing Tison*, 481 U.S. at 158). He directed a co-defendant

to buy bullets which were used in the murder, lured the victim into a high speed chase, did nothing to dissuade the actual shooter, who was in the car with him, and actively participated in the planning of the underlying convenience store robbery. *Lesko*, 925 F.2d at 1551. By no stretch of the imagination do the facts of *Lesko* support the government's attempt to stretch *Tison* to cover the circumstances of the instant case.[3] There was simply nothing potential or theoretical about the defendant's participation in the events surrounding the killing in any of the cases cited by the government, as is plainly the case here. The fact that the government must rely on cases such as these, in none of which did mere membership in a conspiracy provide the predicate for death eligibility, and *in each of which the defendant actively participated in the events immediately surrounding the homicide*, demonstrates how far outside the pale the government's position really is.

C. Statutory construction of 18 U.S.C. § 3591(a)(2)(C)

Of course, even if it could have constitutionally drafted a statute as broad as the government suggests, there is no reason to believe that Congress intended to do so with the FDPA. Had that been its intent, Congress could have tracked the language of *Enmund* and *Tison*. It did not do that, however. Instead, beyond those who directly participate in the act of killing itself (subsections A,B and D), it included only those persons who (1) contemplate the taking of a life or the use of lethal force *and (2) commit an "act" which directly results in the death of the victim*. Thus, even if *Enmund* or *Tison* did not require this second limitation on death eligibility for one whose mental state satisfied the first condition and whose

[3] It should be noted that, despite the government's spending so much time discussing it, Moussaoui has not challenged the constitutionality of the eligibility provisions of the FDPA.

participation is otherwise deemed "major," the fact remains that Congress did not attempt to thread this needle when it passed the FDPA.

The statutory question then is whether Congress, notwithstanding the outer limits of its constitutional power, intended the word "act" in § 3591(a)(2)(C) and (D) to include a conspiracy. The government first attempts to argue that the words "act" and "offense" are synonymous, despite the rules of construction cited by Moussaoui and conceded by the government. Contrary to the position of the government, the use of different terms with different meanings makes perfect sense in the context of capital jurisprudence. The term "act" is used in subsections C and D in order to perform the narrowing function that is at the heart of death penalty schemes. *See, e.g.*, *Buchanan v. Angelone*, 522 U.S. 266, 275 (1998) ("In the eligibility phase, the jury narrows the class of defendants eligible for the death penalty, often through consideration of aggravating circumstances") (citing *Tuileapa v. California*, 512 U.S. 967, 971 (1994)). Thus, while the "offenses" with which Moussaoui is charged are capital offenses, in that death is the maximum possible sentence, *see United States v. Boone*, 245 F.3d 352, 359 (4th Cir. 2001),[4] the FDPA further narrows the pool of death eligible defendants by requiring, at a minimum, a specific "act" which *directly* resulted in the death of the victim.[5] Given the fundamental principles of capital jurisprudence, therefore, and

[4] In *Boone*, the Fourth Circuit held that an offense is capital, and thus the defendant is entitled to the appointment of two counsel, even if the government does not seek the death penalty. *See* 245 F.3d at 359. Indeed, the Court reaffirmed the principle that an offense is capital, and the same rule applies, even if the government *may not* seek death. *Id*. (*citing United States v. Watson*, 496 F.2d 1125, 1126-27 (4th Cir. 1973)).

[5] Numerous state death penalty schemes follow a similar formula. For example, under Virginia's scheme, capital murder is defined by an intentional murder under certain circumstances. Va. Code § 18.2-31, with possible punishments of life imprisonment or death. Va. Code § 10(a). However, only if a further, narrowing aggravating factor is established under the capital sentencing statute is the defendant actually eligible for the death penalty. Va. Code § 19.2-264.2. These sequential narrowing functions are

contrary to the position of the government, (*see* Gov't Resp. at 15-16), the fact that the offenses with which Moussaoui is charged do not require an overt act actually *supports* the conclusion that § 3591(a)(2) requires a specific act above and beyond the conspiracy itself, to establish death eligibility. Indeed, given the breadth of federal conspiracy statutes, and the absence of any requirement of an overt act, it makes perfect sense that Congress would have narrowed the pool of death eligible persons in this fashion, so as to avoid the very result which the government seeks in this case.

The government asserts that, under Moussaoui's construction of the statute, only those who actually participate in the killing could be death eligible. (Gov't Resp. at.19.) That is plainly not the case. Under that construction, subsection C would apply to the hirers in a murder for hire, to persons who order a killing, or to persons who facilitate a killing in some manner. For example, Moussaoui could have been death eligible if he had purchased the plane tickets for one or more of the hijackers. Of course, as the government well knows, he did no such thing, nor did he commit any other act which directly resulted in the deaths of the victims.

The government then erects one of the many straw men that populate its Response, arguing that Congress could not have added conspiracies to the list of capital offenses and then excluded them from the threshold factors. (Gov't Resp. at 18.) No fair reading of Moussaoui's argument could suggest such a result. He has never argued that conspirators may never be death eligible under the FDPA. Rather, he merely notes that under the FDPA, a defendant who commits a capital conspiracy offense must also

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established under the federal scheme first under the criminal statute itself (the "offense" referred to in § 3591(2)) and then under the FDPA (the intentional conduct of § 3591(2)(A) and (B), and the "act" referred to in § 3591(2)(C) and (D)).

participate in some act (beyond mere membership in the conspirator) that directly resulted in the death of the victim in order to become death-eligible. This limitation is no more inconsistent with Congress's designation of conspiracy crimes as punishable by death than is any other limitation imposed by the FDPA on actual death-eligibility, including the requirement that the government establish at least one statutory aggravating factor under 18 U.S.C. § 3592(c). The government's argument to the contrary suggests that it has lost sight of the fundamental rationale of modern death penalty statutes and jurisprudence since *Furman* and *Gregg*.

The government's reliance on the colloquy in *United States v. Nichols*, (Gov't Resp. at 19), is telling in that it is apparently unable to find any more persuasive authority than the transcript of a mid-trial argument. The extremely brief decision of the Court in that case contains *no* rationale: "On the defendant's motion to preclude a sentencing hearing ... I'm denying the motion." (Gov't Resp., Ex. 2 at 34.) That hardly constitutes persuasive authority for this Court under the facts of *this* case. Moreover, the colloquy makes clear that the evidence in *Nichols* had proven not merely a bare conspiracy, but a number of overt acts committed by Nichols that arguably directly contributed to the actual bombing of the federal building in Oklahoma City, including perhaps the purchase of the explosive material actually used by Timothy McVeigh. *(Id*. at 27-28.) Indeed, according to the government, "the jury found it can't be assumed . . . that the jury found that all Mr. Nichols did is agree and performed no acts *in furtherance of* that agreement," and that it had to be "assumed" from the guilt phase verdict that "Nichols engaged in some, if not all, of the *overt acts* . . . ." (*Id.*, Ex. 2 at 27 (emphasis added)). Again, according to the government, "there are acts in addition to the agreement that we have to assume that the jury found." (*Id*.) Consequently—and because the entire argument is intertwined with questions of issue conclusion from the

guilty phase verdicts—it can not be assumed that Judge Matsch ultimately concluded that a conspiracy, standing alone, satisfies the statutory requirements for death eligibility.[6]

The government also purports to find an inconsistency between Moussaoui's argument on this point and the "minor participation" mitigating factor contained in 18 U.S.C. § 3592(a)(3). (Gov't Resp. at 16-17.) There is no such inconsistency. This factor is intended to mitigate the conduct of a defendant who did participate in an act which resulted in the death of the victim— perhaps one of a number of acts by various participants—but whose participation in the overall capital offense was minor. A defendant's conduct could easily satisfy the § 3591(a)(2)(C) threshold but still render him a minor participant in the underlying "offense." To accept the government's position, the court would have to conclude that, throughout the statute, Congress used "offense" and "act" willy-nilly. The far more logical conclusion—indeed, the only legally sound conclusion—is that Congress used each word discriminatingly.[7]

D. Moussaoui's "lies" as the predicate lethal act

Perhaps recognizing the tenuousness of its claim that Moussaoui's wholly ineffective alleged membership in the underlying conspiracy can be deemed an "act" that directly caused the carnage of September 11, the government scours the evidence for a real "act." It is revealing that the only such "act"

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[6] The fact that this occurred mid-trial is also significant. The judge may well have believed that it would not serve the purpose of judicial economy to prevent the penalty phase from proceeding at that point, and that, if a death verdict were returned, he could revisit the issue or the defendant could appeal. Had he granted the motion, of course, the proceedings would, at a minimum, have been significantly interrupted. It is for that reason that federal judges often deny motions for directed verdicts at the conclusion of a plaintiff's case. That rationale obviously does not apply here. It does, however, argue for resolution of Moussaoui's motion pre-trial.

[7] This factor is comparable to minor participant mitigating factors under various state statutes. *See, e.g.*, Tenn. Code Ann.-39-13-204 (j)(5) ("the defendant was an accomplice in the murder [i.e., the offense] committed by another person and the defendant's participation was relatively minor").

cited by the government is Moussaoui's alleged lies when interviewed by law enforcement authorities after he was taken into custody, long before the September 11 attacks. The government's real complaint is not with Moussaoui's alleged lies, but with his failure to reveal the plot—that is, with his alleged unwillingness to give up what the government refers to as his "shield of secrecy." (Gov't. Resp. at 22.) But under the American system of individual liberty, no defendant—not even Mr. Moussaoui—may be sentenced to death based upon his failure to implicate himself in a criminal offense. The government may not try to base a death sentence, even in part, on a defendant's failure to waive his constitutional rights. For example, the government may not cite a capital defendant's post-arrest (or even post-conviction) silence as evidence of his lack of remorse. *United States v. Davis*, 912 F .Supp. 938, 945 (E.D. La. 1996) ("In a criminal context, [lack or remorse] is particularly ambiguous since guilty persons have a constitutional right to be silent, to rest on a presumption of innocence and to require the government to prove their guilt beyond a reasonable doubt. To allow the government to highlight an offender's 'lack of remorse' undermines those safeguards.").

The government may contend that it seeks to punish only Mr. Moussaoui's lies, and not his silence. However, the government utterly fails to demonstrate, or even suggest, how any of the "lies" it cites—as opposed to his failure to confess or cooperate with the authorities—could have directly caused the deaths of the victims. In reality, the government's argument is based not on his alleged falsehoods, but on Moussaoui's failure to implicate himself in an extremely serious crime. After all, his statements about his true purpose did not have any causative effect on September 11, even under the government's argument. Rather, the government's complaint is with his failure to expose the plot. Indeed, the government admits as much. In order to establish the "direct result" nexus, the government states that "*[h]ad defendant*

truthfully disclosed the existence of the conspiracy to federal agents, instead of lying, thousands of deaths would have been prevented." (Gov't. Resp. at 23 (emphasis added).) Thus, absent a confession, Moussaoui's alleged false statements can not satisfy the requirement under § 3591(a)(C) and (D) of a causative relationship between the act and the victim's death, and it is undeniable that the government seeks to predicate Moussaoui's death eligibility on his failure to confess.

The cases cited by the government do stand for the proposition that the making of a false statement to investigators is a crime. (Gov't. Resp. at 23 & n.15.) Nothing in those cases suggests, however, that a defendant's failure to provide evidence against himself is a "false statement." Thus, in evaluating the relevant "act" for the purposes of § 3591(a), the government is limited to his false statements; it can not rely on his failure to make inculpatory statements, and it thus cannot establish the requisite nexus between the "act" and the deaths of the victims.

Finally, the government seeks to justify its reliance on subsection D. Moussaoui does not address that issue further here because, regardless of whether an inchoate crime such as conspiracy is a "crime of violence," the government's argument must fail for the reasons addressed in relation to subsection C.

CONCLUSION

Given the enormity of the September 11 attacks, it was perhaps to be expected that the government would seek to invoke death penalty laws that do not exist, or to stretch those that do beyond recognition, in order to execute at least one man as retribution for this unprecedented attack. But because the government has done so, it becomes this Court's grave responsibility to ensure that the rule of law does

not fall victim of what happened on September 11. The government's notice of intent to seek the death penalty should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Defendant's Reply to Government's Response in Opposition to Defendant's Motion to Strike Government's Notice of Intent to Seek a Sentence of Death was served via facsimile and first class mail upon AUSA Robert A. Spencer, AUSA David Novak, and AUSA Kenneth Karas, U.S. Attorney's Office, 2100 Jamieson Avenue, Alexandria, Virginia 22314 this 15th day of May, 2002.

/S/
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